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NOS. 575, 580, AND 585.

IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1946~~ '47

~~No. 575~~ 27

SECRETARY OF AGRICULTURE, *Petitioner*,

v.

CENTRAL ROIG REFINING COMPANY and WESTERN SUGAR REFINING COMPANY, *Respondents*; PORTO RICAN AMERICAN SUGAR REFINERY, INC., *Intervenor*; THE AMERICAN SUGAR REFINING COMPANY, ET AL., *Intervenors*; and THE GOVERNMENT OF PUERTO RICO, *Intervenor*.

~~No. 580~~ 30

PORTO RICAN AMERICAN SUGAR REFINERY, INC., *Petitioner*,

v.

CENTRAL ROIG REFINING COMPANY and WESTERN SUGAR REFINING COMPANY, *Respondents*.

~~No. 585~~ 32

THE GOVERNMENT OF PUERTO RICO, *Petitioner*,

v.

THE SECRETARY OF AGRICULTURE, PORTO RICAN AMERICAN SUGAR REFINERY, INC., THE AMERICAN SUGAR REFINING COMPANY, ET AL., CENTRAL ROIG REFINING COMPANY, and WESTERN SUGAR REFINING COMPANY, *Respondents*.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS CENTRAL ROIG REFINING COMPANY AND WESTERN SUGAR REFINING COMPANY IN OPPOSITION TO NOS. 575 AND 580 AND IN SUPPORT OF NO. 585.

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IN THE

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OCTOBER TERM, 1948.

No. 575.

SECRETARY OF AGRICULTURE, *Petitioner*,

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CENTRAL ROIG REFINING COMPANY and WESTERN SUGAR REFINING COMPANY, *Respondents;* PORTO RICAN AMERICAN SUGAR REFINERY, INC., *Intervenor;* THE AMERICAN SUGAR REFINING COMPANY, ET AL., *Intervenors;* and THE GOVERNMENT OF PUERTO RICO, *Intervenor.*

No. 580.

PORTO RICAN AMERICAN SUGAR REFINERY, INC., *Petitioner*,

v.

CENTRAL ROIG REFINING COMPANY and WESTERN SUGAR REFINING COMPANY, *Respondents.*

No. 585.

THE GOVERNMENT OF PUERTO RICO, *Petitioner*,

v.

THE SECRETARY OF AGRICULTURE, PORTO RICAN AMERICAN SUGAR REFINERY, INC., THE AMERICAN SUGAR REFINING COMPANY, ET AL., CENTRAL ROIG REFINING COMPANY, and WESTERN SUGAR REFINING COMPANY, *Respondents.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

This brief of Central Roig Refining Company and Western Sugar Refining Company, respondents here and appellants below, is filed in response to the three petitions for

writs of certiorari to review the judgment (R. 198) of the United States Court of Appeals for the District of Columbia Circuit as follows: In No. 575, by the Solicitor General on behalf of the Secretary of Agriculture, appellee below; in No. 580 by Porto Rican American Sugar Refinery, Inc., intervenor below; and in No. 585 by the Government of Puerto Rico, intervenor below. Service of the printed copy of the record was made February 25, 1949, on Roig and Western. They are hereinafter referred to as the "respondents".

OPINION BELOW.

The opinion of the Court of Appeals for the District of Columbia Circuit delivered November 24, 1948 (R. 194-197), is reported in 171 F. 2d 1016.

JURISDICTION.

Petitioners invoke the jurisdiction of this Court under § 1254, title 28, U. S. C.

QUESTIONS PRESENTED.

First, whether Puerto Rico Sugar Order 18 (R. 160-175) is invalid in that it is based on § 207(b) of the Sugar Act of 1948 which, by reason of the refined sugar quota it imposes on Puerto Rican refiners, grossly discriminates against respondents and in favor of the mainland seaboard refiners in violation of the due process clause of the Fifth Amendment.

Second, whether Order 18 is invalid in that it allots the Puerto Rican refined sugar quota contrary to the requirements of § 205(a) of the Sugar Act of 1948.

The case thus involves a constitutional question and a statutory question. Respondents' position is that if writ of certiorari is granted by this Court to review the statutory question, as petitioned by the Secretary of Agriculture and Porto Rican American Sugar Refinery, Inc., this

Court cannot fully dispose of the case without deciding the constitutional, as well as the statutory, question. This follows since a decision affirming the judgment below in favor of respondents on the statutory question, but leaving the constitutional question undecided, grants respondents only a portion of the relief sought by them. On the other hand, if writ of certiorari is granted on the constitutional question as petitioned by the Government of Puerto Rico, then a decision by this Court in favor of respondents on the constitutional question would grant respondents all the relief sought by them, including that based on the statutory question.

STATUTE INVOLVED.

The statute involved is the Sugar Act of 1948 (61 Stat. 922-933, 7 U.S.C., Supp. I, 1100-1160). Sections 207(b) and 205(a) thereof appear on pages 4 and 5 of the petition filed in No. 575 on behalf of the Secretary of Agriculture.

STATEMENT.

The statements of the three petitioners omit, or fail to give proper emphasis to, certain facts believed by respondents to be essential to adequate consideration of the petitions. The following restatement is therefore made:

1. *Facts Bearing on the Constitutional Question.*—Under § 201 of the Sugar Act of 1948 (referred to herein as the "Act") the Secretary of Agriculture determined on January 9, 1948, that for the year 1948, there were needed 7,800,000 tons of sugar to meet the requirements of consumers in the continental United States.[1] The Act assigns quotas for supplying this tonnage among five domestic sugar areas and Cuba and other foreign countries. The

[1] 13 F. R. 132. Later in the year this amount was redetermined to be 7,500,000 tons (13 F. R. 1145-1146, March 3, 1948), then 7,000,000 tons (13 F. R. 2948-2949, June 2, 1948), and finally 7,200,000 tons (13 F. R. 4473, August 4, 1948).

five domestic sugar areas are (1) the domestic beet sugar area (Ohio, Michigan, Nebraska, Montana, Idaho, Wyoming, Colorado, Utah, California, and other states), (2) the mainland cane sugar area (Louisiana and Florida), (3) Hawaii, (4) Puerto Rico, and (5) the Virgin Islands. For the five domestic sugar producing areas the respective quotas are flat amounts specified in § 202(a) of the Act, plus certain "deficit" amounts computed under § 204. The flat amount for Puerto Rico is 910,000 tons. Through computation of various deficits arising from the inability of the domestic beet sugar and the Hawaiian areas to meet their quotas, Puerto Rico's sugar quota for 1948 was increased by December 3, 1948, from 910,000 tons to a total of 1,023,756 tons.[1]

Section 207(b) of the Act limits Puerto Rican refiners to marketing only 126,033 tons of its sugar quota in refined form.[2] Thus in 1948 Puerto Rican refiners could market only 126,033 out of 1,023,756 tons, or approximately 12% of its quota, in refined form. The remaining 897,723 tons or 88% of the Puerto Rican sugar quota, if marketed at all, is thus compelled to be shipped to the ten intervening and other mainland seaboard refiners for refining by them. No corresponding limitation is imposed on the domestic beet sugar area or the mainland cane sugar area. They may market all their sugar in refined form. Denial to Puerto Rican refiners of the right to ship to the mainland

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[1] 13 F. R. 7631-7633.

[2] The Act actually says in the form of "direct consumption sugar." Direct consumption sugar is of three kinds, refined, turbinado (i. e., semi-refined), and direct consumption raw sugar (i. e., raw sugar used for industrial purposes without further refining or improvement in quality as in the manufacture of tobacco products). Very little of Puerto Rico's sugar quota is marketed in the form of turbinado or direct consumption raws and as the Court of Appeals stated for the purposes of the present case " 'Direct consumption' sugar means approximately refined sugar."

in the form of refined sugar of approximately 88% of its quota raw sugar deprives the Island and its refiners of the opportunity to compete for an additional income of around $19,000,000 a year, as estimated by the Secretary of Interior as recently as April 7, 1948.[1] The deprivation creates a corresponding gain in the income of the mainland refiners.

The quota and allotment powers of the Secretary of Agriculture as provided in the 1948 Act expire December 31, 1952 (§§ 411 and 412). Similar powers have been vested in the Secretary of Agriculture since 1934 by the Sugar Act of 1934 (Jones-Costigan Act),[2] and the Sugar Act of 1937 and extensions thereof.[3]

Prior to the enactment of the 1934 Act, *both* mainland refiners and Puerto Rican refiners had the right to buy raw sugar supplies anywhere in the world, in any quantity, and to compete for the entire mainland refined sugar market. Under the 1948 Act (as well as the prior Acts) *both* mainland refiners and Puerto Rican refiners in marketing on the mainland are limited to marketing *quota* sugar, i.e., sugar within the aggregate of the domestic and foreign area quotas for sugar to be consumed in the continental United States, fixed finally for 1948 at an aggregate of 7,200,000 tons. *Both* are denied access to non-quota sugar.

On the other hand, the 1948 Act (as well as the 1937 Act) imposed on Puerto Rican refiners a limitation not imposed on mainland refiners. Thus the Act gave mainland refiners in 1948 the right to refine and market on the mainland all quota raw sugar they could acquire within the 7,200,000

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[1] Hearings on H. R. 5876 before the Subcommittee of the Committee on Public Lands, House of Representatives, April 1948, quoted on p. 14, below. See also H. Rept. No. 2035, 80th Cong., 2d Sess.

[2] 48 Stat. 670, validated 49 Stat. 1539.

[3] 50 Stat. 903, extended by 54 Stat. 1178, 55 Stat. 872, 58 Stat. 283, and 60 Stat. 706.

ton aggregate while Puerto Rican refiners were permitte to compete for the refining and marketing on the mainlan of only 126,033 tons of that sugar. Stated another wa mainland refiners have under the Act the right to refi and market not only all quota raw sugar they are able t acquire from sources outside Puerto Rico, but also ar given a monopoly of the refining of all save 126,033 tons Puerto Rico's 1,023,756 tons of quota raw sugar. Furthe they may legally compete with Puerto Rican refiners eve for the refining of the 126,033 tons.[1] The same situatio existed under the 1937 Act save for periods during whic the President suspended quotas.[2]

What respondents seek primarily is the opportunity t compete with the mainland refiners for the refining an marketing of the whole of Puerto Rico's quota of suga for mainland consumption, not merely 12% of it, and t set aside the mainland refiners' statutory monopoly ov the other 88%.

Respondents contend that section 207(b) of the Ac designed to produce the results described above, grossl discriminates against Puerto Rican refiners, including re spondents, and grossly discriminates in favor of the mai land refiners, including the ten intervening mainland sea board refiners, and that by so doing the section violates th

[1] There is also a small separate quota for local consumption Puerto Rico of around 90,000 tons annually (§ 203 of Act). Mai land refiners may also compete with Puerto Rican refiners for th refining and marketing of this sugar.

[2] The quota provisions were law throughout the period 1937-194 inclusive, under the 1937 Act, save from March 1 to October 1 1940, pending enactment of extension legislation by Congress. How ever, the quota provisions were suspended by proclamations of th President, pursuant to § 509 of the 1937 Act (50 Stat. 916), fo the period from September 11, 1939, to December 26, 1939 (3 CFR 1939 Supp. 69 and 83), and for the period from April 13, 1942, t November 28, 1947 (3 CFR, Cum. Supp. 300 and 12 F. R. 801 December 2, 1947).

due process clause of the Fifth Amendment and gives rise to the constitutional question in this case. The constitutional validity of the general sugar quota provisions of the Act for the relief of the farmers and raw sugar producers is not questioned. Only the refined sugar limitation in section 207(b) granting special privileges to mainland refiners, is questioned as to its constitutional validity.

2. *Facts Bearing on the Statutory Question.*—Section 205(a) of the Act requires "fair, efficient, and equitable" allotments of Puerto Rico's refined sugar quota of 126,033 tons. But such allotments may be arrived at only "by taking into consideration" the three statutory standards of proportionate shares, past marketings, and ability to market.

In Puerto Rico Sugar Order 18 the Secretary made allotments to six allottees (R. 175). Of the six allottees only Porto Rican American, Roig, and Western are primarily refiners and as such compete with the large mainland sugar refiners on the eastern seaboard. On the other hand, Central Aguirre, Central Guanica, and Central San Francisco are primarily producers of raw sugar, not refiners, and as such are not competitors with the mainland sugar refiners, but on the contrary, sell raw sugar to them and are sources of raw supply for them. The following table, prepared from Government figures, sets forth the situation statistically for the calendar year 1947:[1]

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[1] Exhibit B and Exhibit B1, No. 53, issued January 16, 1948, Caribbean Area Office, Production and Marketing Administration, U. S. D. A.

1. Allottee	2. Own Raw Sugar Produced	3. Outside Raw Sugar Purchased (Col. 4 less Col. 2)	4. Total Refined Sugar Produced	5. Refined Sugar Marketed in States	6. Refined Sugar Marketed in Puerto Rico
		(All figures in tons)			
Porto Rican American	63,640	24,519	88,159	60,175	28,303
Roig	48,649	.....	48,228	27,274	20,965
Western	45,978	3,555	49,533	30,801	18,807
Aguirre	107,774	.....	10,336[a]	10,300[a]	36[a]
Guanica	94,551	.....	17,156	.....	17,156
San Francisco	6,643	.....	1,401[a]	1,344[a]	58[a]

[a] Turbinado sugar.

Respondents, Roig and Western, and intervenor Porto Rican American, who are parties to this case, are obviously the refiners principally interested in the Puerto Rican refined sugar quota. Aguirre, Guanica, and San Francisco are not parties to this case.

In making the allotments under Order 18 the Secretary gave no weight to the statutory standard of proportionate shares. He gave 50% weight each to the other two statutory standards of past marketings and ability to market. The Secretary measured the past marketings by skipping back over the years 1947 to 1942 and using each allottee's average marketings of refined sugar on the mainland for the highest five years during the 7-year period from 1941 back to 1935, inclusive (R. 174). He measured ability to market by each allottee's highest single year's marketings of refined sugar on the mainland during the period 1947 back to 1935, inclusive. Porto Rican American's ability to market in 1948 was thus measured by its marketings in 1935.

All these interpretations of the three standards worked to the detriment of Roig and Western and to the advantage of Porto Rican American. Actually the Secretary was applying an extra-statutory standard of restoration of "prewar competitive relationships" among Puerto Rican refiners (R. 158-9, 6, 29, 31) and thereby restoring and re-

inforcing the prewar monopoly of Porto Rican American among Puerto Rican refiners.

These interpretations in Order 18 of the three statutory standards resulted in allotments for 1948 to the three Puerto Rican refiners as follows (R. 175):

Allottee	1941 Marketings (tons)	1948 Allotments (tons)
Porto Rican American	79,237	79,258
Roig	15,028	16,698
Western	13,017	14,772

The comparison above between 1941 and 1948 shows clearly that the Secretary did by Order 18 succeed in restoring prewar competitive relationships.

Following notice and hearing the Secretary formulated Order 18 without first issuing a tentative or recommended decision and affording opportunity for exceptions and on January 22, 1948, made Order 18 public and immediately effective (13 F.R. 310). On February 5, 1948, Roig and Western filed with the Secretary a Petition for Stay and Reconsideration of Order, in which they requested an opportunity to argue orally or by brief questions of law relating to the validity of the Order, including the constitutional and statutory questions presented by this case (R. 176-178). The petition was denied (R. 178-9). Roig and Western, having exhausted all administrative remedies, appealed to the United States Court of Appeals for the District of Columbia Circuit under section 205(b)-(f) of the Act and section 10 of the Administrative Procedure Act (§1009, title 5, U.S.C.), raising in their Notice of Appeal and Petition for Review both the constitutional and the statutory questions (R. 180-182).

The Court of Appeals unanimously reversed the Order and remanded the case to the Secretary on the ground that the Secretary had erroneously interpreted and applied section 205(a) of the Act and each of the three allotment standards therein provided. On the statutory question the

Court held that the Secretary acted contrary to law by failing to give any weight to the standard of proportionate shares, by measuring ability to market in the case of some allottees by past instead of current ability, and by excluding marketings within the last half dozen years in measuring past marketings. But the Court (Justice Edgerton who wrote the opinion disagreeing) failed to decide the constitutional question, stating that—

> "A majority of the court are of opinion that since the order is not authorized by the Act we cannot, within established principles of review, undertake to decide whether §207(b) of the Act is authorized by the Constitution. All agree that this question has been fully argued, and my own view is that we should decide it." (R. 194-197)

ARGUMENT.

A. Position of the Respondents.

1. Respondents' position as to review of the statutory question.

In Nos. 575 and 580, to the extent that the petitions seek review of the statutory question to the exclusion of the consitutional question, respondents oppose the granting of the writs petitioned for by the Secretary of Agriculture and by Porto Rican American. At the same time, respondents call attention to, and agree with, the statement in the Secretary's petition that this case "involves an important constitutional issue" (p. 25). They further agree with the statement that, if the Secretary's interpretation of the statutory standards is in accordance with law, "the constitutional issue will need to be decided" (p. 25).

However, even if the Secretary's interpretation of the statutory standards is contrary to law (as urged by respondents and held by the Court of Appeals), the constitutional question will still need to be decided. The fact that the Secretary does not specifically bring the constitutional question forward in his petition under the heading

"Questions Presented", does not prevent it from being properly before this Court. It was raised, briefed, and as the opinion states, "fully argued" in the court below. In such circumstances, respondents are entitled to urge in *support of the judgment below*, any matters appearing in the record.[1] It is, then, respondents' position and purpose to support the judgment below, not only on the ground that such judgment annulling Puerto Rican Sugar Order 18 is correct as a matter of statutory interpretation, but also on the ground that the judgment is correct in that, the statutory provision under which Order 18 was issued being unconstitutional, the Secretary had no authority to issue any order at all.

2. Respondents' position as to review of the Constitutional question.

Respondents support the petition of the Government of Puerto Rico in No. 585.

B. Reasons for Granting Writ to Review the Constitutional Question.

This case cannot be fully disposed of without a decision on the constitutional question raised below by respondents. Even if the statutory question be decided in their favor (as was done in the court below), the relief is only part of what they seek. That is to say, a decision in their favor on the statutory point gives them relief *within* the refined sugar quota but fails to decide whether they are entitled to be relieved *from* that quota limitation altogether. Their

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[1] *Langnes* v. *Green*, 282 U. S. 531; *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555; *Public Service Commission of Puerto Rico* v. *Havemeyer*, 296 U. S. 506; *Helvering* v. *Lerner Stores Corporation*, 314 U. S. 463.

The constitutional question was raised by respondents in their Petition for Stay and Reconsideration of Order before the Secretary of Agriculture (R. 177) and in their Notice of Appeal and Petition for Review (R. 182).

constitutional point is that they are entitled to the latter. The difference is the right of a Puerto Rican refiner to compete with mainland refiners only within his allotted share of 126,033 tons as against the right to compete with the mainland refiners for Puerto Rico's entire sugar quota which for 1948 was 1,023,756 tons.

The constitutional question raised in this case—whether §207(b) of the Sugar Act of 1948 violates the due process clause of the Fifth Amendment in that it grossly discriminates against Puerto Rican refiners and in favor of the mainland seaboard refiners—is one of general importance; it is of substance relating to the construction and application of the Constitution of the United States; it has not been, but should be, settled by this Court.

The general importance of the question seems clear. It has to do with the relationships between insular possessions and the United States, and more particularly with the nature and extent of the power of Congress over commerce between Puerto Rico and the States and the limitations upon such power. Basically, the question is whether that commerce is protected by due process of law against arbitrary discrimination by Congress. While respondents' litigable interest may be restricted to the adverse effect of section 207(b) of the Act on rgspondents themselves, they point out that this adverse effect extends to Puerto Rico as a whole; their fate is thus involved along with the fate of the Island. The larger interests of the Island are set forth in the petition of the Government of Puerto Rico in No. 585.

The question relates to the construction and application of the Constitution. Indeed, respondents put their objection in the court below, and renew it here, specifically on the ground that the refined sugar quota provision of section 207(b) of the Sugar Act of 1948 violates the due process clause of the Fifth Amendment in that it grossly discriminates against Puerto Rico and its refiners, including

respondents, and in favor of the mainland seaboard refiners.

Arbitrary discrimination is what the respondents complain of. They do not seek relief on the theory that due process of law imposes a judicially enforceable substantive limitation on legislative power in the regulation of economic affairs; they freely admit that Congress has a large power to regulate commerce between Puerto Rico and the States. They invoke, rather, judicial protection against arbitrary discrimination in the exercise of that power. Just as this Court strikes down state laws which discriminate against national interests in interstate commerce so should it strike down Congressional laws which discriminate against local interests in such commerce. If Congress were to single out a State of this Union and fix an arbitrary and grossly discriminatory quota on the amount of its cotton, oil, beets or cane which could be sent, in manufactured or refined form, to other States, there would be little doubt that the quota would fall. Despite the absence of an equal protection clause running against Congress (cf. the Fourteenth Amendment against the States), it has never been denied that due process includes such an indispensable attribute of freedom as equality before the law. *Truax* v. *Corrigan*, 257 U.S. 312, 331-332; *Steward Machine Company* v. *Davis*, 301 U.S. 548, 585.

The refined sugar quota of 126,033 tons, as fixed by statute, is an arbitrary and capricious figure. The Sugar Acts of 1934, 1937, and 1948, show, on the one hand, that Puerto Rican refining is frozen at the level of the depression year 1933, and on the other, that the mainland refiners are unrestricted, that they may refine and market all the quota sugar they can acquire and are given a monopoly of the refining of 88% of Puerto Rico's quota sugar. The mainland refiners may expand with increased population, improved economic conditions, and other demand factors. The debates in Congress at the time of passage of the 1937 Act show the arbitrary character of the discrimination;

the Department of Agriculture itself has used the strongest sort of language to the same effect; the President and the Secretary of the Interior denounced it as arbitrary. (All of the foregoing was developed in respondents' briefs in the court below and will be set forth more fully in presenting this case on the merits if the petitions are granted.) As recently as April 7, 1948, the Secretary of the Interior wrote the Chairman of the Committee on Public Lands, House of Representatives, as follows:

> " . . . An example of such a discriminatory provision is to be found in subsection (b) of section 207 of the 'Sugar Act of 1948' . . . This provision limits the amount of refined sugar which Puerto Rico may ship to the continental United States, a limitation which does not apply equally to the several states, and thus treats Puerto Rico as though it were not a part of the United States, but a foreign country. It has also proved to be detrimental to the insular economy having cost Puerto Rico, between the years 1934 and 1946, an estimated $220,000,000 in revenue. If this provision were repealed and Puerto Rico were allowed to market its sugar in a refined state, Puerto Rico would realize an additional $18,000,000 to $19,000,000 a year and would benefit from a resulting increase in job opportunities, more consumer income, and greater industrial development." [2]

That arbitrary discrimination is the pervading issue in this case becomes even more plain when other related matters are noted which, while interesting and important in themselves, are *not* now involved. For one thing this case is *not* concerned with the *foreign* commerce of Puerto Rico, that is, commerce with *foreign* nations, e.g., Argentina, nor is it concerned with the *foreign* commerce of the United States. Neither is it concerned with *local* commerce on the Island. For another, it does *not* involve any requirement

[2] Hearings on H. R. 5876 before a Subcommittee of the Committee on Public Lands, House of Representatives, April 1948. See also H. Rept. No. 2035, 80th Cong., 2d Sess.

or contention that a law of Congress must operate with complete uniformity over the States and Territories. Again, it does *not* involve any requirement or contention that Puerto Rico must be treated in all respects as a State. Still again, it does *not* involve any derogation of the power of Congress to regulate commerce, including commerce between Puerto Rico and the States. What, then, the case *does* involve is simply whether Congress, in regulating that commerce, must desist from arbitrary discrimination against respondents and other sugar refiners of Puerto Rico and in favor of the mainland seaboard refiners.

The constitutional question has not been settled by this Court. As a matter of fact, so far as we have been able to discover, the precise issue raised in this case has never come to a judicial determination. In the court below the Secretary contended for an arbitrary and unlimited power in Congress over commerce between Puerto Rico and the States and for putting the power of Congress over commerce with "unincorporated" territories on precisely the same basis as the power of Congress over commerce with foreign countries (Secy. 2nd Br. 13, 15). He argued that Congress may impose an "absolute embargo" (Secy. 2nd Br. 12), that limitations for "the purpose of encouraging a domestic industry present no due process problem" (Secy. 2nd Br. 14). We deny the existence of any such unlimited power, and urge, to the contrary, that due process prohibits any arbitrary discrimination in the exercise of the power.

Of the cases which come closest to the matter in issue (as found by us or as urged by the Secretary) only two require present comment: *Downes* v. *Bidwell*, 182 U. S. 244, and *Hooven & Allison Company* v. *Evatt*, 324 U. S. 652. But it may be said at once that, in respect of their specific holdings, neither of them controls the question in this case. The *Downes* case involved the validity of a federal impost on goods from Puerto Rico challenged as in violation of the express requirement of uniformity

"throughout the United States" for such imposts; and the *Hooven* case involved the validity of a State *ad valorem* tax on goods from the Philippines challenged as in violation of the express prohibition against imposts by a State.

The diversity of views of the Justices (they divided 5-4 in both cases, with five opinions in the first and four in the second) attests the complexity of the problem and the lack of agreement on its constitutional solution. No opinion in the *Downes* case commanded a majority of the Court. But it is unmistakably clear that the question had to do with the geographical aspect of the provision relating to uniformity "throughout the United States". Thus, by Justice Brown in announcing the conclusion and judgment:

> "... We are now asked to hold that it [Puerto Rico] became a part of the *United States* within that provision of the Constitution which declares that 'all duties, imposts, and excises shall be uniform throughout the United States' ...
>
> "To sustain the judgment in the case under consideration it by no means becomes necessary to show that none of the articles of the Constitution apply to the Island of Porto Rico. *There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only 'throughout the United States' or among the several states.*" (182 U.S. at 249 and 276, emphasis supplied.)

In the *Hooven* case, as we have said, the question concerned the applicability of a specific prohibition on the taxing power of a *State*. The Court, using the "original package" rule, invalidated a state *ad valorem* tax on hemp from the Philippines. The Court said that the articles in question were "imports" because "the place from whence they are brought is not a part of the United States in the constitutional sense to which the provisions with respect to [taxation of] imports are applicable." The majority confined the discussion to the Philippines (p. 672); they cited Congressional statutes—e.g., the Philippines Independence

Act—which have no comparable counterparts with respect to Puerto Rico; four Justices dissented from the application of the original package rule in this case; and—a most unusual occurrence—*five* Justices protested against the economic consequences of the decision.

These cases, then, are concerned with specific geographical limitations on the *taxing* power of the Nation and States. They do not preclude this Court from determining, on the merits and having regard to specific differences in applicability of various provisions of the Constitution, the extent of the *regulatory* power of Congress over commerce between Puerto Rico and the States. The question in this case is an open one.

This Court is peculiarly the forum for the settlement of the question. In the exposition of principles involved in the doctrine of judicial review in constitutional cases the Court has indicated a certain relationship between the exercise of judicial power and the operation of political processes. Thus, for example, is the suggestion, originating with Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 435, and renewed by Stone in *Helvering* v. *Gerhardt*, 304 U. S. 405, 416, that judicial intervention may not be needed to protect the States against national encroachment to shield the parts from action by the whole—and for the reason that the people of the States, acting through their representatives in the Senate and House, are in position to protect themselves. See also, *Wickard* v. *Filburn*, 317 U. S. 111, 120, per Jackson, J. But the people of Puerto Rico are outside that reasoning—they have no vote in the body which imposes the limitations upon them, e.g., the sugar quota now drawn in question. This case, then, exhibits an arbitrary discrimination against people who are denied representation; it presents an appropriate occasion for the exercise of judicial power.

C. Reasons for Denying Writ to Review the Statutory Question.

The statutory question involves only a fight among three Puerto Rican refiners (Roig, Western, and Porto Rican American) as to their respective shares of the Puerto Rican refined sugar quota. While of great importance to each of them, the question is not one of general importance nor is it one of substance relating to the construction of a statute which has not been, but should be, settled by this Court. Determination of the statutory question does not affect the consumer or the supply of sugar for the continental United States but affects only how much of a small portion (slightly over 1%) of that supply will be furnished by each of the three Puerto Rican refiners. No other Act provides for allotments on the basis of the three statutory standards of concern here.

There is no conflict among decisions of circuit courts of appeals over the proper interpretation of the standards. The United States Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction over appeals from allotment orders under the Act (§ 205(b)). That court's decision in the present case is consistent with its only other decision on similar points. See, *Gay Union Corporation* v. *Wallace*, 71 App. D. C. 382, 112 F. 2d 192 (1940).

On the statutory question there is no failure of the court below to give proper effect to any applicable decision of this Court.

The decision below is clearly correct on the statutory question. When the court below decided the *Gay Union Corporation* case under the 1937 Act the three statutory standards of proportionate shares, past marketings, and ability to market read in the disjunctive—"or", not the conjunctive—"and". Subsequent to the decision Congress amended section 205(a) so that in the 1948 Act the three statutory standards read in the conjunctive and the Secretary is required to take into consideration all three stan-

dards. In Order 18 the Secretary held the standard of proportionate shares inapplicable and failed to take it into consideration (R. 171). In Order 18 he actually measured ability to market by past performance (R. 173) and in his brief below stated that he had concluded that "ability to market could best be measured by actual performance (i.e., past marketings)." He did this even though past marketings are a standard separate and distinct from ability to market. The result is that despite the amendment made by Congress the Secretary has, as to four of the six allottees, actually taken into consideration and applied only one of the three standards, namely, past marketings. He has applied that standard twice, once in its own right, and once by measuring ability to market by using 1935, 1936, 1939, and 1940 past marketings. By reading out of the statute in effect the standards of proportionate shares as to six allottees and ability to market as to four allottees and using as to these four the one standard of past marketings, the Secretary treats the Act as though it had never been amended. The decision below is clearly correct in requiring the Secretary to give consideration to all three statutory standards.

Omitting proportionate shares as an applicable standard is no longer permissible in view of the amendment of the statute making the three standards now read in the conjunctive instead of the alternative. Whether or not the standard is applicable to allotment of quotas of foreign countries (cf. Secy. Pet. 18), it is clearly applicable to allotment of quotas of the five domestic sugar areas since proportionate shares are assigned to the farms in all such areas. The Secretary never has allotted the quotas of foreign areas. The court below was clearly right in requiring some weight to be given to the standard of proportionate shares in making allotments of sugar quotas for the domestic areas.

In order to restore prewar competitive relationships and preserve Porto Rican American's prewar monopoly (it had

95.7% of the refined sugar quota in 1935), the Secretary measured Porto Rican American's ability to market a 1948 allotment by its performance in 1935 (R. 173). Never since —not even in prewar years—has Porto Rican American marketed anything like the 116,611 ton figure of 1935 (R. 147). Clearly the court below was right in requiring the standard of ability to market to be measured by current performance if performance, rather than plant capacity, was to be the measuring stick.

Also to restore prewar competitive relationships and preserve Porto Rican American's prewar monopoly, the Secretary in measuring past marketings excluded marketings during 1942-1947 and used those of the allottee's five highest years during 1935-1941 (R. 172). The period used includes all of Porto Rican American's five highest years, but only two of Roig's and one of Western's (R. 147). The excuse given by the Secretary of Agriculture is that the war years were a period of abnormality (R. 169). Obviously in no one year are marketing conditions precisely the same as in any other year. Admittedly during the war years many kinds of control were imposed on all of us. Moreover, marketing conditions in the war years represent 1948 marketing conditions more nearly than do marketing conditions in the prewar years.

The evidence cited (R. 164-165) by the Secretary to the effect that Puerto Rican refiners were not equally affected by what the Secretary terms "wartime dislocations", is decidedly unconvincing. It consisted of a statement by the Government Witness that the dislocations "affected first one and then the other, either favorably or adversely dependent on the moment" and that "refiners closer to San Juan at some one time or other, may have been more favorably treated than others" as to availability of ships at a nearby port. Incidentally Western is further from San Juan than Porto Rican American; Roig nearer. The remaining evidence cited by the Government on this point is

of blackouts, gas rationing, shipping priorities, and other wartime restrictions that Porto Rican American complained of as "difficulties" and which Roig and Western surmounted (as did Porto Rican American) and so refused to call difficulties (R. 61-62, 139). Even Porto Rican American, despite its purported difficulties, was throughout the war period able to market, in the same year as produced, all its refined sugar produced for marketing in the States, save in one year when a small amount was carried over until February of the following year (R. 88-89). The question, however, is not one of evidence but of the proper interpretation of the words "past marketings". The statute does not say "marketings in a representative period to be determined by the Secretary" or "past marketings adjusted for war abnormalities."

The real difficulty with Porto Rican American's mainland marketing record during the war years was that there existed under Government controls a price differential (R. 49) in favor of marketing refined sugar in the Island as against marketing it on the mainland. Porto Rican American consequently chose to increase its local marketings at the expense of its mainland marketings (R. 12, 25, 147). It did not have raw sugar supplies sufficient to build up both mainland and local marketings (R. 85-87, 37), as did Roig and Western.

Clearly the court below was correct in holding that the statutory standard of past marketings did not permit the exclusion of marketings during the past years of 1942-1947.

The effect of the decision below is to prevent the Secretary from manipulating the statutory standards by a variety of untenable ad hoc interpretations all designed to restore and reinforce Porto Rican American's prewar monopoly of refining in Puerto Rico.

D. The Case is Not Moot.

The Solicitor General in his petition on behalf of the Secretary (p. 24) specifically takes the position that the case is not moot. Respondents agree.

Under the Act (§ 201) the Secretary cannot make his determination as to the amount of sugar needed to meet the requirements of consumers in the continental United States until December of the year preceding the allotment year. Allotments of Puerto Rico's sugar quota and of its refined sugar quota for the allotment year are not made until after that determination. Thus Order 18 for the allotment of the refined sugar quota for 1948 was made public January 22nd of last year. The corresponding order for 1949 has not yet been issued.

Marketing of refined sugar for mainland consumption in excess of the amount permitted by the allotment order is, under the Act, subject to severe penalties—three times the market value of the sugar (§ 405). To refine sugar for mainland consumption in any allotment year in amounts in excess of the allotment order for that year is not practicable. It involves relying on the contingency that such order might be set aside by a final judgment of a court prior to the end of the allotment year and the marketing of the sugar thereby permitted during the allotment year without risk of penalties. If the order is not ultimately set aside the risks of loss through penalties for marketing excess refined sugar or through storage costs and the physical deterioration if not marketed but carried over, are too great.

Finally there is little likelihood (and this case well illustrates the point) of obtaining final judgment before the close of the allotment year. The value of court review of allotment orders under the Act is not that it affords relief with respect to the order for the allotment year under review but that the decision serves as a guide to the Secretary when called upon to act again on the same matter for

a subsequent year. In such a situation a case is never moot. *Gay Union Corporation* v. *Wallace*, 71 App. D. C. 382, 112 F. 2d 192, 195, cert. den. 310 U. S. 647; *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 452; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 515; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 413-414; *Ford Motor Co.* v. *United States*, 335 U. S. 281, 313 (advance sheets).

In the hearings held by the Secretary of Agriculture in January of this year preparatory to issuance of an order allotting the Puerto Rican refined sugar quota for 1949, both Roig and Western, as well as Porto Rican American and the Government of Puerto Rico, raised the question of the constitutional validity of the hearing and other proceedings in connection therewith as well as of any order issued pursuant thereto. The constitutional question presented by Order 18 for the year 1948, if not decided in connection with the present case, would be presented to the courts in connection with the corresponding order for 1949. This affords an added reason for the determination of the question at this time.

CONCLUSION.

Wherefore, it is respectfully submitted that the petitions for writs of certiorari in Nos. 575 and 580 to review the judgment of the Court of Appeals for the District of Columbia Circuit with respect to the statutory question should

be denied, and the petition for writ of certiorari in No. 585 to review that judgment with respect to the constitutional question should be granted.

Respectfully submitted,

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